



ADVANCE SHEET – ISSUE 95

New & Improved – Honest!

Welcome and thank you for deciding to take a few minutes to spend with us. I would hazard a guess that most if not all of you have seen advertisements for products that tout themselves as being “new and improved.” You probably thought to yourself the old product must not have been very good and how long is it going to be before they start promoting yet another iteration as “new and improved?” Perhaps I should title the article something else? Yes, you’re right, it is too late, you have already seen it. Now what should I say? I have found that when faced with a dilemma it is always best to look to the past and how the great figures of history might have handled a situation so in the words of one of those giants “Let me make this perfectly clear,” that while the Library newsletter was already good, it is now even better. How you might ask?

The Bar Library was founded in 1840 by an assemblage of what can only be described as the “best and the brightest” of the Maryland legal community, led by the Honorable George William Brown. Over the course of the last 179 years, men and women of great distinction have made the causes of the Library their own. This tradition continues today with individuals giving their time and talents to various and sundry Library projects. When Mr. George Liebmann, the President of the Library’s Board of Directors proposed at a recent meeting that the Library consider expanding the scope of its newsletter, I thought one possible manner to accomplish this would be to solicit contributions by members of the Bar Library family. Not surprisingly, the first two individuals to respond were Mr. Liebmann and the previous, past President of the Library’s Board, Mr. H. Mark Stichel. Mr. Liebmann’s contribution are the remarks he made to the Mencken Society on Mencken Day, September 9, 2017 entitled “Mencken on Church and State.” Mr. Stichel has provided “THE RESTATEMENTS – FIRST, SECOND, THIRD . . .” a condensed and updated version of a paper he presented to the Wranglers Law Club on February 16, 2017.

In addition to contributed pieces, each issue will now feature an article profiling an individual from the history of the Library. The first such profile will be of Charles H. Dorsey, Jr., Esquire, who served on the Library’s Board of Directors from 1978 to 1995.

I hope that you enjoy this edition of the Advance Sheet. If you have any suggestions or comments, please let us know. It is and always has been our goal to reflect and serve the interests of our members in all things that we do. Also, remember that if you are reading this you are indeed a member of the Bar Library family. Have something that you would like to say or have said that you feel might be of interest to thousands of other members of the local legal community, say an article or perhaps a talk that you have given? The e-mail is jwbennett@barlib.org and I look forward to hearing from you and sharing your thoughts with our readers.

Joe Bennett

Mencken on Church and State *

REMARKS OF GEORGE W. LIEBMANN ** BEFORE THE MENCKEN SOCIETY, AT THE MARYLAND HISTORICAL SOCIETY, MENCKEN DAY, SEPTEMBER 9, 2017

MENCKEN ON CHURCH AND STATE

I am honored to be asked to deliver this talk, but in some measure your presence here is due to false advertising. I am a lawyer who has written about constitutional law, but I am not here, your newsletter to the contrary notwithstanding, to make the case for a militant secularism in the law. Mencken's attitude toward religion was more nuanced than that. He was that rarest of things, a militant advocate of tolerance, and as the events of the last few months in Baltimore should remind us, demands for tolerance must be directed inward as well as outward.

What did Mencken say about religion, and where would he have stood on the church-state controversies of our time? Here are my recollections and speculations.

Was Mencken an atheist? Clearly not. His statement on this was characteristic and unequivocal. "Atheism, properly so called, is nonsense. I can recall no concrete atheist who did not appear to me to be a donkey."

Was Mencken an agnostic, as many, including my friend Marion Elizabeth Rodgers, have suggested? Hearken to the Sage of Hollins Street: "He may after all awake post-mortem and find himself immortal. This is the agnostic's hell." And elsewhere: "I can well understand the human yearning that makes for a belief in immortality."

On the Catholic Church, he observed: "Its basic doctrines are plainly preposterous and its hopes are futile, but nevertheless it continues in being and perhaps serves a genuine need." "At compromise and connivance the Catholic church shows a much greater limberness than any other Christian church, and so it seems likely to survive all the rest. It avoids the capital mistake of assuming that all Christians are actually Christians: even the pope himself is under formal suspicion, and must confess his sins like anyone else. Once a Frenchman announced to an American friend that he was leaving the church of his fathers. The American asked what variety

of Protestantism he proposed to patronize. 'I have lost my faith,' answered the Frenchman icily, 'but not my reason.'" Aquinas, Mencken said, "got rid of the age-old conflict between the unhealthy catacombish utopianism of the early Church and the everyday needs and desires of normal men living in a naturally pleasant world."

To the Christian Scientist Marion Bloom, with whom his relationship foundered on matters of religion, he wrote:

"The God business is really quite simple. No sane man denies that the universe presents phenomena quite beyond human understanding and so it is a fair assumption that they are directed by some understanding that is superhuman. Anyone who pretends to say what God wants or doesn't want or what the whole show is about is simply an ass."

In what is perhaps his clearest statement on matters of religion, he observed: "If there is anything plain about the universe it is that it is governed by law and if there is anything plain about law it is that it can never be anything but a manifestation of will."

Mencken, in short, was a believer in intelligent design, or of deism, the faith of most of the Founding Fathers, other than those from the deep South. His view was that the "scientific view leaves a good many dark spots in the universe but not as many as theology." He did not pretend that there were no unknowns. The late George Kennan was a latter-day adherent of this view, believing, in the words of Michael Prowse, "in two Gods: a Primary Cause who brought the physical world into being and has no interest in our fate and an entirely separate Merciful Deity, partly within us, to whom we can turn at a time of need." Mencken believed in at least the first of these Gods.

I am not sure that he would have embraced the doctrinaire anti-clericalism of Justice Black, and of Justice Douglas (at least when he was not running for President). The justice who seems to me to have most closely shared his ideals and personality was Mr. Justice Jackson, notwithstanding that Jackson had been both a New Dealer and an interventionist. "Jackson," Philip Kurland observed, "in many ways was representative of the best that the era of the 1920s could produce. But it was an era that ended with the depression and the New Deal. And so he found himself a 'loner' in a group-oriented society, an individualist in a collectivist world." It was Jackson who lamented, at the end of his life, that "The American industrialist has just ceased to be an individualist. . . the liberals have tended to collectivism and communism. . . Both groups, it seems to me, lack imagination and constructive thinking." This view was shared by Learned Hand: "The herd is regaining its ancient and evil primacy; civilization has been reversed, because it has consisted of exactly the opposite process of individualization." It was Jackson who declared, in the second flag salute case "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."

It seems clear that Mencken would have applauded the unanimous judgment of the Supreme Court in *Epperson v. Arkansas* invalidating a statute like that involved in the Scopes trial prohibiting the teaching of the theory of evolution in the public schools. But it is far from clear

to me that he would have joined the 1987 opinion in *Edwards v. Aguillard* invalidating a statute which while contemplating the teaching of evolution also required the teaching of what was described as “creation science.” The decision was a 7 to 2 decision with several anguished concurrences. The dissenting opinion of Justices Scalia and Rehnquist observed “The people of Louisiana including those who are Christian fundamentalists are quite entitled as a secular matter to have whatever scientific evidence there may be against evolution presented in their schools just as Mr. Scopes was entitled to present whatever scientific evidence there was for it.” A later statute authorizing teaching of ‘intelligent design’ was condemned by a District Court in Pennsylvania charging the defenders of the statute with “an utter waste of monetary and personal resources.”

There is more than a small irony in the resistance in the name of science to even a modicum of religion in the schools. The historian Page Smith, in his history of towns in America, made the interesting discovery that a disproportionate number of the nation’s scientists and inventors had their origins in towns founded as covenanted communities by religious sects. His explanation, not his only, was that “Protestant orthodoxy and the psychology of the small town engendered an ideal of professional calling a fluidity of social organization and an ethic of service to the larger good that, in an increasingly materialistic and secular society, made science a most attractive field for young men from thousands of small-town communities. The fact that a very large proportion of scientists were the sons of Protestant clergymen would seem to give added emphasis to this generalization.”

One can even suspect that the passion of the more doctrinaire secularists is inspired less by a devotion to science than a devotion to upper-Bohemian lifestyles.

Mencken had a deep dislike of both religiosity and nationalism. “I am sick and tired of this nationalism anyhow. That goes for racialism. I want to travel without visas, on one passport, without crossing any frontiers. I am sick and tired of calling a man a Catholic or Jew.”

He had a violent prejudice against ‘identity politicians’, who dominate both political parties in our time. He observed, with fine impartiality: “You have professional Jews. I don’t like religious Jews. I don’t like religious Catholics and Protestants.” His denunciation of Zionism united his dislike of religiosity and of nationalism and resembled that of Joseph Roth, the great elitist of the Austro-Hungarian Empire, in *The Emperor’s Tomb*: “If you want to live differently and have your own two by four country like all those Wilsonian creations in the Balkans, go right ahead!”

We need not speculate too much on where he stood on most other church-state legal issues: he was fundamentally a separationist, as was disclosed in his 1937 draft for a new Maryland Constitution which I have perused thanks to the good offices of one of your members, Henry R. Lord:

“No law shall be passed establishing a religion or favoring the tenets or practices of any faith or sect or penalizing any discussion thereof as blasphemy or impeding the conduct of religious exercises at any place or in any manner not imperiling the public peace or health, or appropriating any funds for any religious purposes or for any institution controlled by a religious

body; but the funds of any division or agency of the State may be paid out to such an institution by law to an amount not greater than the reasonable and actual value of its care for public charges.”

Thus he would have opposed direct aid to parochial schools or religious colleges. On the other hand, it is far from clear that he would have opposed school vouchers or aid to parents. He had no particular affection for public schools. His draft constitution made no provision for them. His book *Happy Days* ends with the end of his stay at Dr. Knapp’s academy, a private school. He then attended the Baltimore Manual Training School, later Baltimore Polytechnic. While he made excellent grades in most subjects, he left with no love of the sciences and a keen dislike for his chemistry teacher. In his *Treatise on Right and Wrong*, he declared: “The evil growth of the more absurd forms of nationalism during the past century is probably due to the spread of free education. When the pedagogue becomes a public functionary, his natural puerility and timidity are increased, and he is a docile propagandist of any doctrine enunciated by the politicians. It would be hard to imagine a more shaky guide to sound morals and common decency.”

After the Second World War, Agnes Meyer, the wife of Eugene Meyer, the publisher of the *Washington Post*, tried to enlist Mencken in her “campaign against what she describes as a Catholic plot to seize the public schools” only to be met with the reply: “if it succeeded, the schools would be greatly improved.”

Mencken’s draft Constitution prohibited religious tests for office and provided that “no juror be deemed incompetent because of his religious belief or lack of belief.” With respect to the legislative body, it declared that “No person shall be eligible who is or has ever been a minister of the gospel.” There had been a similar provision in Maryland’s 1851 Constitution, carried forward in 1867 notwithstanding that George William Brown, a delegate to the Convention, observed that in his experience the worst demagogues were not ministers but lawyers.

The Scopes trial fully aroused his passions: “On the one side was bigotry, ignorance, hatred, superstition, every sort of blackness that the human mind is capable of.” As for the Holy Rollers of Tennessee, they “rose to such heights of barbaric grotesquerie that it was hard to believe it was real.” His obituary of William Jennings Bryan danced on his grave and was founded on a similar view, even though he and Bryan, along with Robert La Follette were the most prominent Americans to oppose American entry into World War I.

Mencken was a skeptic, but not a nihilist: “I doubt everything, including my own doubts.” Like Jefferson (who prepared a Bible with the theology removed), and the late Clement Attlee, who urged “Christian ethics without the mumbo-jumbo”, Mencken “preferred a code of ethics divorced from a religious creed of any sort”, “forgetting what the vague gods ordain and concentrating upon what mere man is able to do, and in fact does. . . this essentially scientific apparatus is really possible.” His difficulty, and ours, is how to root such a code in the conduct and feeling of the great mass of men. “Some will do the right thing out of charity,” the great British Catholic jurist Lord Patrick Devlin observed in his book on *The Enforcement of Morals*, “but for the great mass of men faith and hope are necessary also.”

Where would Mencken have stood on the great constitutional controversies of our time? He probably would have approved of the Supreme Court decisions of the 1920s invalidating prohibitions of the teaching of German and the operation of private and parochial schools, but like the free speech scholar Harry Kalven would have wanted to rest them on the First Amendment rather than property rights. There is language in his draft of a Maryland Constitution suggesting that he might have agreed with the ban on prohibition of contraception imposed by *Griswold v. Connecticut*. He regarded the Roman Church's exaltation of chastity as obsolete even in his time; anticipating the advent of the pill, he observed: "I tremble to contemplate what would happen if an infidel scientist discovered that conception could be prevented by some indubitably 'natural' means, such as a manganese-free diet."

But I doubt that he would have stayed on board for *Roe v. Wade* with its transformation of medical ethics; even the feminists of the 1930s perturbed him: "Nor is the moral virtuoso made more prepossessing when he takes the Devil's side and howls for license instead of for restraint. The birth controllers, for example, often carry on their indelicate crusade with the pious rancor of prohibitionists." And further: "In order that women may cease to be ruined for one banal indiscretion, we are now asked to abandon not only the idea of chastity but also that of fidelity to contract."

Mencken knew too much about the history of morals to embrace Justice Stevens' proposition in the Webster abortion case that legislation could be condemned if it looked like "official endorsement of a theological tenet." After all, Justice Holmes had famously cautioned on the first page of his book on *The Common Law* that "The life of the law has not been logic, it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious. . . had a good deal more to do than the syllogism in determining the rules by which men should be governed."

Still less would he have embraced as a constraint on legislation governing conduct, as distinct from expression, Justice Kennedy's declaration in the *Casey* and *Obergefell* cases that "At the heart of the concept of liberty is the right to define one's own concept of existence, of meaning, of the universe and of the mystery of human life." Mencken aspired to an ethical code, not to moral anarchy. "Man, the first mammal to be domesticated, has been a docile member of society since the Pliocene: it is now too late for him to behave as anything else. Save as an occasional aberration, recognized as such, it is in fact simply impossible for him to think of himself as standing alone. He is the social animal par excellence, and he is incurably resigned to enduring whatever goes with that character, the bitter along with the sweet."

I have the suspicion that Mencken would not have disagreed with the sentiment inspired in George Kennan upon viewing a Catholic religious procession in Mexico in 1950:

"I have never taken offense at the thesis of the Roman Church that many men require a spiritual as well as a profane framework of law: a moral order founded on an appreciation of the dilemmas of birth and death and of the requirements of social living; a moral order drawn up by those who are wiser and more experienced than themselves and capable of channeling into the body of spiritual law the ponderous experiences of the millennium of human progress. For many people it is better that there should be some moral law, even an imperfect one or an entirely

arbitrary one, than that there should be none, for the human being who recognizes no moral restraints and has no sense of humility is worse than the foulest and cruelest beast.”

Writing of an era in which social Darwinism held sway and there were few restraints on economic self-indulgence, Justice Brandeis said that “The worst years were before 1929.” His sometime law clerk, Dean Acheson, referred in his eulogy of Brandeis to the same period as “the desert years of the human spirit.”

In reflecting on Thomas Jefferson’s respect for the natural world, the historian Daniel Boorstin wrote: “Jefferson had justified toleration and the differences of ideas primarily because a designing Creator had intended variety in minds as in the rest of the creation. It was this sense of creatureness that finally gave the Jeffersonians their sense of community and prevented an emphasis on ‘rights’ from becoming anarchy or from making society seem a hopeless jungle. . . . One hundred years after Jefferson, man had arrogated to himself the energy, craftsmanship and power of his Creator. When man should conceive himself his own Creator, the full danger of ‘the will to power through the understanding of nature’ would be laid bare.”

I have tried to show that for Mencken, the claims of science were not absolute; what was absolute was the right of free discussion. There is inscribed around the dome of a public building in Washington, erected and maintained at public expense, the essence of Mencken’s creed: “I have sworn upon the altar of God eternal hostility against every form of tyranny over the mind of man.”

* In 1930 Mencken’s *Treatise on the Gods* was published. It was a survey of the history and philosophy of religion, a subject Mencken seemingly never tired of writing about. In that the first and second printings were sold out before publication and eight more printings followed, including editions published in 1997 and 2006, it appears to be something that Mr. Mencken’s followers have never tired of reading about either.

** George W. Liebmann has served on the Board of Directors of the Library Company of the Baltimore Bar since 1971, in the capacity as President from 1975 to 1977 and from 2006 to the present day.

THE RESTATEMENTS – FIRST, SECOND, THIRD . . . ***

H. Mark Stichel ****

The American Law Institute was founded in 1923. Since then, the ALI has promulgated Restatements of the Law in several subjects and other influential works such as the Model Penal Code and the Uniform Commercial Code, a joint venture with the Uniform Law Commission. The ALI also has sponsored studies and, in recent decades, has issued Principles of the Law, which are primarily addressed to legislatures, administrative agencies, or private actors, as opposed to Restatements, which are primarily addressed to the courts. Retired Supreme Court Justice Anthony M. Kennedy recently remarked that the Restatements and the ALI “did for the American, Anglo-American judicial process and for the law in the 1920s what Blackstone had done 150 years earlier.” The Bar Library has a complete collection of Restatements and other ALI materials, including drafts that are not commonly available.

The ALI and How Restatements Are Made.

In 1914, the American Association of Law Schools appointed a committee to consider the feasibility of an institute in Washington where American and English students and scholars could gather to study jurisprudence and the law. The AALS effort was interrupted by World War I but was taken up again in 1920 and 1921. William Draper Lewis, then a professor at the University of Pennsylvania approached Elihu Root, then the leader of the American bar, who agreed to lead the effort to found what ultimately became the ALI. The ALI’s first meeting in 1923 included luminaries from the legal profession, many of whom still are household names today – William Howard Taft, then Chief Justice of the United States, Oliver Wendell Holmes, Benjamin Cardozo, John W. Davis, Learned Hand, Roscoe Pound, John Wigmore and Harlan F. Stone. The primary affiliations of the attendees at the 1923 meeting – the bench, the practicing bar and academia – are still reflected in the ALI’s membership today. As of June 2019, the ALI has 2,812 Elected Members, 1,576 Life Members (elected members who have served 25 years or more) and 257 Ex Officio Members (*e.g.*, law school deans and state supreme court chief justices who are not otherwise ALI Members). The ALI’s membership breaks down as follows:

- 39% Practicing Attorneys
- 37% Academics
- 13% Judges
- 11% Corporate, Government, Nonprofit

The ALI’s membership represents a broad spectrum of the legal profession. There are ALI members from every state. Several judges from each of the federal appellate circuits and at least one judge from 36 state supreme courts are elected members. Maryland lawyers and judges have played important roles within the ALI since its founding. William L. Marbury, Sr., and Charles McHenry Howard were among the original members of the ALI, Judge T. Scott Offutt of the Court of Appeals of Maryland was one of the Advisers for the First Restatement of

Torts and several other judges of the Court of Appeals have been members. Many Baltimore Bar Library members also have been members of the ALI, including William L. Marbury, Jr., who was a member of the ALI Council for almost 40 years and whose personal ALI materials are in the Bar Library's collection.

Most lawyers encounter the Restatements of Contracts and Torts in their first year of law school and accept the Restatements as a given without much thought as to how they came to be. Without getting into too much detail as to how the sausage is made, here is a brief overview of the process, which in many respects has not changed since 1923.

In order to understand the process, one has to understand the ALI's structure. Insofar as approval of Restatements and other ALI products is concerned, the ALI is a bicameral organization consisting of the ALI Council, a group of approximately 60 judges, professors and lawyers, and the ALI Membership. Every ALI Restatement has to be approved by both the Council and the Membership before it is the official position of the ALI. The Council meets several times per year; the Membership meets each year in May for three days. Each Restatement has a Reporter, a distinguished academic, and most Restatements have one or more Associate Reporters. Reporters and Associate Reporters are appointed by the Council. The work of the ALI is administered by the Director, who usually has an academic appointment in addition to being Director, a Deputy Director, who is a full-time administrator, and a staff headquartered in Philadelphia. The ALI has had only six Directors in its history – William Draper Lewis, who taught at and served as Dean of the University of Pennsylvania Law School; Herbert Goodrich, who was a judge of the U.S. Court of Appeals for the Third Circuit and also had been Dean at Penn; Herbert Wechsler of Columbia Law School, who had been the primary draftsman of the Model Penal Code; Geoffrey Hazard of Yale Law School; Lance Liebman, formerly Dean of Columbia Law School; and the current Director, Richard (“Ricky”) Revesz, formerly Dean of New York University Law School. Each Restatement Project has a formal group of Advisers, approximately 10-30 members with expertise in the subject area of the Restatement. Each project also has a Members Consultative Group or MCG to which any member can join.

The Reporter and Associate Reporters produce an initial draft or drafts for a Restatement; it is not uncommon for parts of a Restatement to be drafted seriatim. The initial draft or drafts are presented to the Advisers and MCG for comment; the Advisers and MCG meet either together or separately with the Reporter and Associate Reporters once or twice per year for a one-day meeting during the life of a project. The Advisers and MCG members also comment in writing throughout the drafting process;

The timeline for a Restatement, from the time a project is initiated until the Restatement finally is approved can take from five to ten years. Although the drafting process can seem glacial to an outsider or newcomer, it is integral to the standing of the Restatements. The ALI is a self-appointed body with no formal authority. The deliberative process through which Restatements go before they become final is what gives the Restatements their authority.

Restatement First, Restatement Second, Restatement Third . . .

During the era between the founding of the ALI and the end of World War II, the ALI produced nine Restatements. In 1947, a committee chaired by Judge Learned Hand, recommended that the ALI revise the Restatements and the Second Restatements were begun.

When the ALI launched the second series of Restatements in 1952, all Restatements from that era were designated Restatement (Second) even though one of the projects in the series, the Restatement (Second) of Foreign Relations Law of the United States, was the first Restatement of that subject. In 1987, the ALI launched the Third series of Restatements and in 2012 the ALI launched the Restatement (Fourth) of the Foreign Relations Law of the United States. In 2015, the ALI Council adopted a new protocol regarding numbering of Restatements. Going forward, the numbering of completed projects will be unchanged. Thus, the Restatement (Fourth) of the Foreign Relations Law of the United States will not be renumbered even though it is only the third restatement in the area. But, in the future, the ALI will proceed sequentially. Thus, the Restatement of Employment Law, which was approved in 2015, does not have a numerical designation because there was no previous Restatement in the area and the current Restatement of Conflict of Laws project will carry a “Third” designation when it is completed because there are only two previous Conflicts Restatements. Up to this point, all Restatements within a given series have the same color binding. The Employment Restatement has a burgundy binding, a new color for the ALI.

A cursory examination of the various series of Restatements will show differences among them. The first series of Restatements largely consisted of black letter pronouncements with little commentary; Reporters’ Notes were in appendices and quite short. The second series of Restatements had more substantial commentary. The third series of Restatements has even more substantial commentary and robust Reporters’ Notes.

In terms of substance, the First Restatements largely were restatements of the majority rule then applied by courts across the United States. However, even the First Restatements had reformist elements. For example, Section 90 of the Restatement of Contracts, promissory estoppel, was something that Samuel Willison the Reporter for the project had advocated in his treatise but was not accepted generally by the Courts at that time.

The Second Restatements were more reformist in character. They reflected changes in legal scholarship and the courts in the post-World War II era. Perhaps the most notable example of the reformist character of the Second Restatements is Section 402A of the Restatement (Second) of Torts, which imposed strict liability for defective products. William Prosser, the Reporter for the Second Restatement, had advocated for strict liability for defective products. However, there was no case that applied strict liability generally. Justice Roger Traynor of the California Supreme Court was an Adviser to the Restatement (Second) of Torts project. Just as the project was about to be approved – without a general strict liability provision – Traynor authored an opinion, *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897 (1963), that adopted the concept. Prosser then produced a new draft and the ALI accepted it. Notwithstanding the scant support for Section 402A, it was readily adopted by courts across the country, including the Court of Appeals of Maryland.

In 2015, Justice Antonin Scalia criticized modern restatements in an opinion in which he partially dissented from the Supreme Court's reliance on Section 39 the Restatement (Third) of Restitution and Unjust Enrichment. Justice Scalia said:

I write separately to note that modern Restatements—such as the Restatement (Third) of Restitution and Unjust Enrichment (2010), which both opinions address in their discussions of the disgorgement remedy—are of questionable value, and must be used with caution. The object of the original Restatements was “to present an orderly statement of the general common law.” Restatement of Conflict of Laws, Introduction, p. viii (1934). Over time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be. Keyes, *The Restatement (Second): Its Misleading Quality and a Proposal for Its Amelioration*, 13 Pepp. L.Rev. 23, 24–25 (1985). Section 39 of the Third Restatement of Restitution and Unjust Enrichment is illustrative; as Justice THOMAS notes, *post*, at 1068 (opinion concurring in part and dissenting in part), it constitutes a “ ‘novel extension’ ” of the law that finds little if any support in case law. Restatement sections such as that should be given no weight whatever as to the current state of the law, and no more weight regarding what the law ought to be than the recommendations of any respected lawyer or scholar. And it cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current law.

Kansas v. Nebraska, 135 S. Ct. 1042, 1064 (2015) (Scalia, J., concurring in part and dissenting in part).

The distinction between the First and Second Restatements is not as drastic as Justice Scalia suggested. More importantly, the Second Restatements largely have been accepted by the courts. Thus, with a few notable exceptions, the Restatements – First, Second and Third – are a good predictor of what a court will do if there is no controlling precedent and a good support for making an argument that controlling precedent should be changed if it conflicts with the Restatement rule. The Court of Appeals of Maryland began citing the Restatements even before they were in final form. *See, e.g., State ex rel. Schiller v. Hecht Co.*, 165 Md. 415, 422 (1933) (Torts); *Brown v. Fahey*, 157 Md. 481, 485 (1929) (Contracts); *Atlas Realty Co. v. Galy*, 153 Md. 586, 594 (1927) (Agency). Further, federal courts will look to Restatements when trying to predict what a state supreme court (or, in the case of Maryland, the Court of Appeals) will do when there is no controlling precedent. Even Justice Scalia cited newer Restatements with approval in his opinions.

Not all Restatements are created equally. For example, among the Second series of Restatements, the Restatement (Second) of Conflicts of Laws has had significantly less acceptance than other Restatements. Maryland has clung to the First Restatement of Conflict of

Laws. But, even the Court of Appeals' refusal to adopt the Second Restatement's interest analysis construct for resolving conflicts, is not as steadfast as the Court would have us believe. As Professor William L. Reynolds has written, the Court of Appeals has manipulated "public policy" exceptions to escape the formalism of the First Restatement.

The Restatements and You.

The Restatements are a good source of information about the law. Modern Restatements have copious Reporters' Notes that can be good sources for further research. Depending upon your position in a case, the Restatement can be good support for a position where there is no controlling precedent or you wish to change controlling precedent. The Restatements also serve a valuable function of presenting the language and structure of a substantive area of the law in a comprehensive and organized fashion. Reported cases, because of the nature of litigation, provide focused but limited insights into an area of the law. Especially in appellate litigation, having a broad view of the subject can be very helpful in making and justifying arguments.

The Future.

The ALI has several projects in the works. The ALI Membership approved the Restatements of Liability Insurance and Torts: Economic Harm at the May 2018 Annual Meeting and the Restatements of Charitable Nonprofit Organizations and International Commercial and Investor-State Arbitration at the May 2019 Annual Meeting. Hardbound, final texts of these Restatements are in progress and should be published soon. The proposed final drafts of these Restatements currently are available on LEXIS and Westlaw.

The final installments of the Restatement (Third) of Torts, which has been published in parts, are in the works. In January 2019, the ALI Council approved three new torts projects to complete the Restatement Third – Defamation and Privacy, Remedies, and Concluding Provisions. The ALI has been working on a Restatement of the Law of American Indians. That project is well on its way to completion and should be approved in 2020 or 2021. One current project about which I am especially excited is the Restatement (Third) of Conflict of Laws. The project is many years from completion. However, I have high hopes that the Reporters will be able to bridge the gap between the theories of the Second Restatement and current practice in the Courts to produce a Restatement that will have broad acceptance, including by our own Court of Appeals. Finally, the ALI has begun a Restatement (Fourth) of Property. The goal is to have the entire field restated in one work as opposed to the way that the Restatement (Third) of Torts has been produced. Given the scope of the project, I expect that we will not see it in final form for many years.

As the ALI approaches its 100th anniversary, it continues to fulfill its mission to clarify, modernize, and otherwise improve the law. The Bar Library began collecting ALI publications in the 1920s and has a comprehensive, up-to-date collection of ALI materials.

*** The following is a condensed and updated version of a paper presented by Mr. Stichel to the Wranglers Law Club on February 16, 2017.

**** Mark Stichel is a principal in the firm Astrachan Gunst Thomas, P.C. Mr. Stichel was elected as a member of the American Law Institute in 2007 and has been an active participant in

the Institute's work. He was President of the Library Company of the Baltimore Bar from February 1992 to November 2006, and a Director from 1989 to 2006.

Bar Library Profile: Charles H. Dorsey, Jr.

As part of our revised and expanded newsletter, each issue we will be taking a look at one of the leading figures in the history of the Bar Library. The honor of leading off goes to Charles H. Dorsey, Jr., Esquire, who served on the Library's Board of Directors from 1978 until his death in 1995.

Charles H. Dorsey, Jr. was born and raised in West Baltimore. He attended St. Catherine's Academy and spent six years preparing for the priesthood at Epiphany Apostolic College in Newburgh, New York. He left the seminary, he once said, "to be more involved in the rough-and-tumble life." He nevertheless remained active with the Catholic Church and Catholic Charities. In addition, he served as Director of the West Baltimore Interfaith Interracial Council and was recipient of the Papal Order of the Knights of St. Gregory, the highest lay honor the Catholic Church bestows. The first African-American undergraduate at Loyola College in Baltimore, Mr. Dorsey interrupted his education to enlist in the Air Force. He served in Korea and was honorably discharged as a first lieutenant. He returned to Loyola and received his degree in 1957. In 1983, he was the recipient of the school's Alumni Laureate Award. After receiving his law degree from the University of Maryland in 1961 he entered private practice with the firm of Brown, Allen, Russell and Watts.

During the late 1960s, Mr. Dorsey was a member of the Baltimore Welfare Commission and was an assistant City Solicitor under George L. Russell, Jr. He was also the first African-American named to the state Board of Law Examiners, which writes and grades essay questions on the state bar examination. Mr. Dorsey joined the Legal Aid Bureau in 1969 as Deputy Director, and was named Executive Director in 1974. The Bureau at that time had just two offices outside Baltimore. Under his leadership, it grew to have a network of offices across the state, with several hundred lawyers, clerks and staff. Mr. Dorsey proudly and rightfully touted his legal team as the equal of any private law firm in the state. Under his direction, the bureau took many cases to the Supreme Court, including one that successfully challenged federal rules barring children born out of wedlock from receiving Social Security benefits from their deceased fathers. Mr. Dorsey also filed the landmark suit that curbed overcrowding in the state's prisons. A man who led by example, a man who saw providing access to justice as a never ending fight, Mr. Dorsey pursued his mission up to the day of his passing. According to his brother William A. Dorsey, "He was the kind of farmer who thought that he should die behind the plow."

Mr. Dorsey "worrying that his clients would suffer in this age of downsizing," his brother said. "He had an undying belief that poor people were entitled to the same level of legal representation as anyone else in this country." He fought to preserve the bureau's effectiveness for its clients during repeated attempts by the state and federal government to reduce its public funding. "If people don't have access to the courts," he said, "there's more of a tendency to take the law into their own hands. And I think that is detrimental to everybody in this society." At

the time of his passing, Harriet Taylor, deputy director of the Legal Aid Bureau said "He had a zest for justice for all people. He dedicated his life to assuring access for all people to the legal system."

Each year the American Bar Association recognizes exceptional work by a public defender or legal aid lawyer with "The Dorsey Award." The Award was established as a tribute to Mr. Dorsey, and first awarded in 1996.

When I think of how long it has been since this very decent and kind man has been gone from this world, and been enjoying his rightfully earned reward in the next, I cannot help but be saddened by the fact that the young lawyers of today never had the chance, as I did, to know him. He was that most marvelous of combinations: a nice guy who was extremely competent and productive in achieving the goals that he worked for.

Joe Bennett

New Collection At The Library

Until recently, I was under the impression that everything an individual could do on behalf of an institution, President of the Board George Liebmann had done for the Library. I was wrong. Several months ago Mr. Liebmann called and wanted to know if the Library was interested in various items of furniture. Well, much of that furniture has now been relocated to the Library including several cushioned chairs and a bookcase that have been placed in the Venable Moose Room. I thought new bookcase, how about a new collection. Having inherited my love of books from my grandfather who had quite an extensive home library, over the years I have generally bought books rather than borrowed them from a library. With things getting a little crowded at home, why not start donating them to the Library. To date, I have brought about twenty-five in which Barbara has dutifully cataloged as part of the Library's collections. She in turn has caught the fever and begun donating herself.

The books, which can be seen under New Acquisitions, below, mostly deal with various aspects of American history from the colonial era to today, although there are a few, such as *The Bounty: the true story of the mutiny on the Bounty*, by Caroline Alexander, that deal with subjects that will not be part of your A.P. American History exam. (Did I mention that my son just got a 5?)

If your house, like mine, is starting to get a little crowded, you might want to think about donating the book you have had sitting on that shelf for the last few years to the Library where it stands a much better chance of being read than it does at its present location. We even promise to put a book plate in it to let everyone know that we think that you are "a little more than alright." Books in the collection may be borrowed for thirty days.

Joe Bennett

New Acquisitions

Horwitz Collection

Brinkley, Douglas.

Rightful heritage: Franklin D. Roosevelt and the land of America. (2016)

HORWITZ 973.917 B75R

Brinkley, Douglas.

The wilderness warrior: Theodore Roosevelt and the crusade for America. (2009)

HORWITZ 973.91 B75W

The Cambridge companion to Sherlock Holmes, edited by Janice M. Allan & Christopher Pittard. (2019)

HORWITZ 823.8 C35

Geoghegan, Thomas.

Only one thing can save us: why America needs a new kind of labor movement. (2014)

HORWITZ 331.88 G37O

Holloway, Anna Gibson and Jonathan W. White.

"Our Little Monitor": the greatest invention of the Civil War. (2018)

HORWITZ 973.75 H65O

Nann, John B. and Morris L. Cohen.

The Yale Law School guide to research in American legal history. (2018)

HORWITZ 349.73 N36Y

Robertson, James L.

Heroes, rascals, and the law: constitutional encounters in Mississippi history. (2019)

HORWITZ 976.2 R62H

Tough cases: judges tell the stories of some of the hardest decisions they've ever made, edited by Russell F. Canan, Gregory E. Mize, and Frederick H. Weisberg. (2018)

HORWITZ 347.737 T66

Twining, William.

Jurist in context: a memoir. (2019)

HORWITZ 340.092 T86J

Winkler, Adam.

We the corporations: how American businesses won their civil rights. (2018)

HORWITZ 346.73 W56W

J.A.B. Collection (Moose Room)

Alexander, Caroline.

The Bounty: the true story of the mutiny on the Bounty. (2003)

J.A.B. 996.1 A53B

Andrew, Christopher M. and Oleg Gordievsky.

KGB: the inside story of its foreign operations from Lenin to Gorbachev. (1990)

J.A.B. 327.1 A53K

The Appalachians: America's first and last frontier, edited by Mari-Lynn Evans, Holly George-Warren, and Robert Santelli with Tom Robertson. (2004)

J.A.B. 974 A59

Atkinson, Rick.

The long gray line. (1989)

J.A.B. 355.0092 A85L

Bowen, Catherine Drinker.

Miracle at Philadelphia: the story of the Constitutional Convention, May to September, 1787. (1986)

J.A.B. 342.73 B68M

Brookhiser, Richard.

Founding father: rediscovering George Washington. (1996)

J.A.B. 973.4 W37B

Colby, William Egan, with James McCargar.

Lost victory: a firsthand account of America's sixteen-year involvement in Vietnam. (1989)

J.A.B. 959.704 C66L

Connell, Evan S.

Son of the morning star. (1993)

J.A.B. 973.8 C66S

Cronkite, Walter.

A reporter's life. (1996)

J.A.B. 070.92 C84R

Demos, John.

The unredeemed captive: a family story from early America. (1994)

J.A.B. 973.25 D46U

Donald, David Herbert.

Lincoln. (1995)

J.A.B. 923.2 L73D

Edsel, Robert M. with Bret Witter.

The monuments men: [b Allied heroes, Nazi thieves, and the greatest treasure hunt in history. (2009)

J.A.B. 940.53 E23M

Khrushchev, Nikita Sergeevich.

Khrushchev remembers: the glasnost tapes. (1990)

J.A.B. 947.085 K57

Meacham, Jon.

Franklin and Winston: an intimate portrait of an epic friendship. (2003)

J.A.B. 940.53 M42F

Mendenhall, Corwin.

Submarine diary. (1991)

J.A.B. 940.54 M46S

Sheehan, Neil.

A bright shining lie: John Paul Vann and America in Vietnam. (1988)

J.A.B. 959.704 S47B

Truman, Harry S.

Where the buck stops: the personal and private writings of Harry S. Truman, edited by Margaret Truman. (1989)

J.A.B. 973.099 T62W

Valentine, Douglas.

The Phoenix program. (1990)

J.A.B. 959.704 V35P

Waller, John H.

The unseen war in Europe: espionage and conspiracy in the Second World War. (1996)

J.A.B. 940.54 W35U

Wienczek, Henry.

An imperfect god: George Washington, his slaves, and the creation of America. (2003)

J.A.B. 973.4 W37W

Wilentz, Sean.

The rise of American democracy: Jefferson to Lincoln. (2005)
J.A.B. 973.5 W55R

Young, Marilyn Blatt.
The Vietnam wars, 1945-1990. (1991)
J.A.B. 959.704 Y67V

Maryland Books

Washington County (Md.)
Code of the public local laws of Washington County, 2019 edition, July 1, 2019 (Article 22 of the Code of Public Local Laws of Maryland): comprising all the local laws of the State of Maryland in force in Washington County to and inclusive of the acts of the General Assembly of 2019.
KFMD 1799.W2 A35 2019

Treatises

American Law Institute.
Principles of the law, student sexual misconduct: procedural frameworks for colleges and universities: discussion draft (April 17, 2018) - Kept in Office Until Bound.
KF4225 |B.S49D

American Law Institute.
Restatement of the law, the law of American Indians : tentative draft, no. 2 (March 13, 2018) - Kept in Office Until Bound.
KF395.A3 I53T

Travels Without Charley

Like Steinbeck, my family has a dog named Charley. Unlike Steinbeck, when we travel we do not take him with us. He is, however, a beloved member of the family, and when my daughter Mary, who is in the Army sends us a letter or package, she will frequently address it to Mr. Charles Bennett. Mary is presently stationed at Schofield Barracks on the Island of Oahu in the State of Hawaii. Our latest “travels” were to see her.

The last time I was in Hawaii was 1977. I was an eighteen year old high school senior on a class trip with a bunch of other eighteen year old high school seniors and a number of priests whose duties were to keep us from acting like eighteen year old high school seniors. We still

nevertheless, managed to have a pretty nice, albeit, pretty clean cut time. Jack Lord was Steve McGarrett, and Thomas Magnum was three years from his fictional birth. How sad that both series have been redone. Is the ability to create something new completely dead, or is it that after a hundred odd year of movies and seventy-five years or so of television, that every story that could be told, has been told?

As we walked down our driveway in a driving rain to our car at 3:30 in the morning for a 6:00 A.M. flight, we were soon standing at a kiosk on long term parking lot A in that same rain, as two full buses passed us on their way to the airport. Fortunately for us three was the charm and we were soon at the terminal. Twelve and a half terrifying hours later, including a brief stop in Los Angeles, we were picking up our car from Enterprise. I cannot fathom being anywhere without a car, and over the course of several weeks, and around a thousand miles, I can pretty safely say that excepting the road that leads to NSA headquarters, we drove over just about all there were.

Several paragraphs ago I mentioned when I had previously been to Hawaii and how old I was letting you know in the process that I am in fact old. Perspectives on everything change over time and I am not sure whether mine are based on changes that have taken place on Oahu, or changes that have taken place within myself, but, since this article is intended to serve as something along the lines of a travel advisory, “buyer beware” and remember that many old people tend to like to complain.

Oahu is amazingly beautiful with a great deal to see and do. It is, unfortunately, so saturated with people that you will frequently feel you are at Pimlico on Preakness Day. The two clearest examples I can give of this was the morning we went to Diamond Head for the crater hike and one of our few other trips into Honolulu to visit the zoo and have lunch on Waikiki Beach. In that the weather was forecasted to be fairly hot the day we had scheduled for the crater hike, we decided to be there when the park opened at 6:00 a.m. I figured if we could get up for a 6:00 a.m. flight, why not a 6:00 a.m. nature hike. Well, when we arrived the rather large parking lot was so full, not just with cars, but also with tourist buses, we were barely able to find a place to park. As for the hike itself, it felt something akin to Interstate 95 during rush hour. When the top was finally reached, we chose to forgo going to the highest observation level since it was an estimated fifteen to twenty minute wait time.

The Honolulu Zoo is really rather nice, although not at the level of some of the top zoos around the country such as those in Columbus, San Diego or St. Louis. There are, however, many fine exhibits including one featuring African painted dogs, which I find totally fascinating. What the zoo does is make full utilization of the fact that it is in Hawaii. The trees and foliage make it a worthwhile time in and of themselves. Zoos, because of their spread out nature can be enjoyed even when there are crowds, which there were not the day we visited. Our trip to Duke’s Waikiki for lunch, which is located right on the beach, was something else again. As you walk down Kalakaua Avenue, you feel the same press of humanity that you do walking down the street in Manhattan. After lunch, which was really very nice, we started back to our car by walking along the beach, but soon abandoned the effort. Although a straight line might be the shortest distance between two points, on Waikiki Beach it is impossible to do anything other than take an extreme zig zag route through a veritable sea of humanity. I calculated that on the day

we were there each individual was afforded roughly a foot of beach and a cup of water, leading me to wonder “Why oh why Waikiki?”

Ironically, one activity on Oahu that enables you to avoid the multitudes is to visit the beach. For some reason that I don't understand, perhaps someone reading this with a knowledge of Oahu can let me know, many of the best beaches you could ever hope to visit, some considered amongst the best beaches in the United States, have few tourists visit them. During our stay, included among the beaches that we visited were Waimea Bay and Bellows Beach (the portion that we visited is located on an Air Force base and limited to military personnel and their families) to the east or windward side, Sunset Beach on the North Shore and Pokai Bay on the west. I particularly enjoyed the section of Pokai that we visited in that a sea wall kept waves at bay producing a most relaxing result. Pokai also provided a glimpse of the best and worst of Oahu. At one point my wife and I decided to walk along the beach to investigate the other side of the sea wall. What we saw amongst the waves were numerous large sea turtles and various other sea life including fish and crabs scurrying across the rocks. Regrettably what we also saw nearby were several hypodermic needles perhaps from some of the homeless that you see throughout the Island, particularly near beaches.

Although I would hazard a guess that everyone knows Hawaii is home to Pearl Harbor, I would hazard a similar guess that many do not know that Pearl Harbor is home to a number of other attractions including the submarine the USS Bowfin, which was launched on December 7, 1942 and the USS Missouri, the battleship on which the Japanese officially surrendered, bringing World War II to a conclusion. Both may be toured, offering a fascinating glimpse into the life of those who served on board, if not a total understanding of what that life must have been like.

My wife and I like local history museums and a museum that provides that, as well as a look at the various cultures that make up the people of Hawaii, is the Bishop Museum. We both enjoyed it a great deal and highly recommend it. Another stop that we enjoyed was the Byodo-In Temple, a Buddhist temple located in the Valley of the Temples Memorial Park. It was dedicated in August 1968 to commemorate the 100 year anniversary of the first Japanese immigrants to Hawaii. Calling it picturesque does not really do justice to the temple and its surroundings.

As to this and that's, Oahu, save for Honolulu, has become fairly famous or infamous depending how you feel about them, for feral chickens. When we were in the shopping district of Hale'iwa, a small town on the North Shore, a mother hen and five or six chicks walked along the sidewalk seemingly without a care in the world. As for shave ice, we were across the street from Matsumoto, and the line was not too long and the temperature was getting up there so we thought why not. We discovered that shave ice is, no matter what people might say, just a snow cone. Not too bad, but I kind of prefer the good old fashioned Baltimore snowball with a generous portion of marshmallow on top. Finally, when it comes time for the purchase of those souvenirs, you do not want to miss the Aloha Stadium Swap Meet & Marketplace. Held Sunday between 6:30 a.m. and 3:00 p.m. and Wednesday and Saturday between 8:00 a.m. and 3:00 p.m., over 400 local merchants offer the best value on imported merchandise, handmade items, eclectic art pieces, popular local snacks, and other made in Hawaii products. The preceding was from their web site but it is in fact true. The more you're looking to buy, the more you need to go here.

Although much of what I might presently think about Oahu is different from the impressions of an eighteen year old boy, one constant is my estimation of the Hawaiian people. Almost down to the individual the people of Hawaii that I spoke to and interacted with embodied kindness and to exude a definite joie de vivre. While I frequently do not get it, they seem to. God bless them, my daughter and all those that serve our country.

Joe Bennett

Hours & Holiday Closings

Hours

The Library will be operating under its Summer Hours during July and August. Those hours are:

Monday – Thursday - 8:30 A.M. – 6:00 P.M.

Friday - 8:30 A.M. – 5:00 P.M.

Saturday - 10:00 A.M. – 1:00 P.M.

The Library's regular hours (September – June):

Monday – Thursday - 8:30 A.M. – 8:00 A.M.

Friday - 8:30 A.M. – 5:00 P.M.

Saturday – 10:00 A.M. – 5:00 P.M.

Closings

Labor Day - Monday, September 2, 2019 (Library Closed)

Columbus Day - Monday, October 14, 2019 (Library Closes at 6:00 P.M.)

Veterans' Day - Monday, November 11, 2019 (Library Closes at 6:00 P.M.)

On Columbus Day and Veterans' Day the Library will be opened while the rest of the Mitchell Courthouse is closed. Those wishing to use the Library on those days must enter through the Lexington Street entrance, the only one that will be open on those days.